BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHERYLE L. MILDFELT Claimant VS. **EASTRIDGE** Respondent AND **KANSAS ASSOCIATION OF HOMES FOR THE AGING INS. GROUP, INC.** Insurance Carrier	)	Docket No. 190,321

ORDER

On the 6th day of December, 1994, the application of respondent for review by the Workers Compensation Appeals Board of a Preliminary Hearing Order entered by Administrative Law Judge James R. Ward, dated September 1, 1994, came on for oral argument in Topeka, Kansas.

APPEARANCES

Claimant appeared by and through her attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Jeffrey A. Chanay of Topeka, Kansas. There were no other appearances.

RECORD

The record in this case consists of the documents on file with the Division of Workers Compensation, including the transcript of the Preliminary Hearing held on August 29, 1994, before Administrative Law Judge James R. Ward and the exhibits attached thereto.

ISSUES

This is an Application for Review filed by the respondent from a Preliminary Hearing Order awarding temporary total disability compensation, medical benefits and authorizing treatment with Dr. Lynn D. Ketchum. The issues presented for review are:

(1) Whether claimant sustained an accidental injury to her left wrist arising out of and in the course of her employment with respondent on or about February 21, 1994;

(2) Whether claimant gave appropriate and timely notice to the respondent of the alleged accident pursuant to K.S.A. 44-520;

(3) Whether claimant is entitled to temporary total disability benefits from February 21, 1994 through March 31, 1994;

(4) Whether claimant is entitled to medical treatment from Dr. Lynn D. Ketchum, as authorized treating physician, and payment of Dr. Ketchum's medical bills.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

(1) Claimant developed a ganglion cyst on her left wrist as a result of a series of accidents and through repetitive use of her left upper extremity each and every day worked through February 21, 1994.

The Appeals Board has jurisdiction to review a finding regarding a disputed issue of whether the employee suffered an accidental injury which arose out of and in the course of the employee's employment. K.S.A. 44-534a.

Claimant testified that she went to work for respondent in June 1993 as a CMA/CNA. She worked first shift until January or February 1994 when she was changed to the 10:00 p.m to 6:00 a.m. shift. According to claimant, this increased the amount of lifting she was required to do. She had no prior problems with her hands but after the change in shifts a problem developed. She had aches and soreness in her left wrist and eventually noticed a soft lump. When the lump became hard and sore, she went to see Dr. Tom Walsh.

Claimant did not ask her employer for medical treatment but Dr. Walsh is the company physician for the respondent. He referred claimant to Dr. Chris Fotopoulos, who performed surgery. Dr. Fotopoulos told her that the condition could be work related, although he later declined to put this opinion in writing.

Claimant also saw Dr. Lynn D. Ketchum whose report of August 5, 1994 states that in his opinion, ". . . there is a direct correlation between the ganglion and her work, as that type of work is hard on joints and ligaments, and it is very likely that this occurred as a result of her job."

Respondent introduced a letter dated May 2, 1994 from Dr. Thomas E. Walsh stating that in his opinion the claimant's ganglion cyst is not work related.

Claimant bears the burden of proof to establish her claim. "Burden of proof" is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

> ". . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

In order to recover, the claimant must establish she has sustained a personal injury by accident arising out of and in the course of her employment. K.S.A. 44-501(a). "Personal injury" is defined in K.S.A. 44-508(e) as:

> ". . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living."

The terms "injury" and "accident" are not synonymous. Each must be established by the claimant. An "accident" is ". . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force." K.S.A. 44-508(d). An accident is an event which causes an injury. The injury is a change in the physical structure of the body which occurs as a result of the accident. Barke v. Archer Daniels Midland Co., 223 Kan. 313, 317, 573 P.2d 1025 (1978).

Further, the claimant must establish that she has sustained an accident and injury arising out of the employment and in the course of the employment. These are separate elements which must be proven in order for the claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973). In order to establish that the incident "arose out of the employment", the claimant must show that there is some causal connection between the accident, injury and the employment. To do this, it must be shown that the injury arose out of the nature, conditions, obligations and incidents of the employment. Only risks associated with the work place are compensable. "In the course of the employment", relates to the time, place and circumstances under which the accident occurred, and that the injury happened while the employee was at work at his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

The Kansas Supreme Court has ruled that it is not necessary for the injury to be caused by trauma or some form of physical force to be compensable. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 379, 573 P.2d 1036 (1978). Personal injury or injury results from an accident which can occur in a single event or from a series of events which occur over time. The event or events do not have to be traumatic or manifested by force. Rather, an accident can occur when, as a result of performing his or her usual tasks in their usual manner, the employee suffers an injury. Downes v. IBP, Inc., 10 Kan. App. 2d 39, 41, 691 P.2d 42 (1984), rev. denied 236 Kan. 875 (1985).

The Appeals Board finds that the claimant has proven by a preponderance of credible evidence that she suffered personal injury by accident arising out of and in the course of her employment with the respondent by a series of accidents culminating on February 21, 1994.

(2) The Appeals Board finds that claimant gave appropriate and timely notice to the respondent of the alleged accident pursuant to K.S.A. 44-520.

The Appeals Board has jurisdiction to review a disputed finding of whether notice was given. K.S.A. 44-534a.

Claimant testified that up until the time Dr. Fotopoulos informed her that her condition could be work related, she had not made any connection between the problems with her wrist and her job. She had before that date discussed her wrist problems with her charge nurse and with her director of nursing but did not inform them that she considered her wrist problems to be work related until after the surgery. Surgery was performed on February 28, 1994. She was off work from February 21 until April 1, 1994. Claimant testified that about a week after Dr. Fotopoulos told her that her condition could be work related, she reported that to the workers compensation insurance carrier for the respondent. She was told by the insurance company representative that they had paid a few claims for ganglion cysts which were work related and that they needed a letter from her doctor. She asked Dr. Fotopoulos for a letter stating that her condition was work related but he said he would not sign one.

Respondent put on the testimony of Susan Greene, Director of Nursing for respondent. She testified that she was aware of claimant's wrist problems and the fact that claimant was off work for treatment of her wrist, but claimant never told her that her wrist injury was work related.

Claimant testified that she told Pat Brennon, the Nursing Home Administrator, that Dr. Fotopoulos had said that the wrist condition could be work related. This conversation was a day or two after her surgery. The nursing home administrator did not testify but an Employer's Report of Accident signed by Patrick Brennon and dated March 3, 1994, states that claimant alleges an accident February 21, 1994 consisting of a ganglion cyst to the left wrist from stress and strain to the wrist. This is consistent with claimant's testimony of having reported to Mr. Brennon a day or two after surgery that the wrist condition could be work related and having then called the respondent's workers compensation insurance carrier with this same information.

Based upon the evidentiary record presented for purposes of this preliminary hearing, the Appeals Board finds that the claimant has proven by a preponderance of credible evidence that she gave timely notice of accident to the respondent as required by K.S.A. 44-520.

(3,4) The furnishing of medical treatment and the payment of temporary total disability compensation are issues over which the Administrative Law Judge has the authority to make findings and orders at a preliminary hearing. These are not issues which are considered jurisdictional and thereby subject to review by the Appeals Board on appeals from preliminary orders. See K.S.A. 44-551(b)(2)(A) and K.S.A. 44-534a. There is no allegation made that the Administrative Law Judge exceeded his authority in ordering

temporary total disability compensation. Accordingly, the Appeals Board finds that it does not have jurisdiction to review that issue at this stage of the proceedings.

Respondent does challenge the designation by the Administrative Law Judge of Dr. Lynn D. Ketchum as authorized health care provider. Respondent argues that the Administrative Law Judge exceeded his jurisdiction by denying respondent the opportunity to provide three (3) names. However, this was not a situation where claimant was seeking a change of authorized health care provider since respondent had never designated a treating physician or otherwise offered to provide medical treatment. Respondent argues that the employer should not lose its right to control medical treatment for exercising in good faith its right to have an Administrative Law Judge rule on an issue going to the compensability of a claim. Granted, this is a legitimate consideration for the Administrative Law Judge when deciding how medical treatment should be provided. However, it does not divest the Administrative Law Judge of authority to make a designation at preliminary hearing where medical treatment has not been provided following a request for same by claimant. We have held in the past that an Administrative Law Judge may designate a treating physician under these circumstances. As such, the Administrative Law Judge has not exceeded his jurisdiction in naming Dr. Ketchum as the authorized health care provider in this instance. Accordingly that issue is not subject to review by the Appeals Board on appeal from a preliminary order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge James R. Ward, dated September 1, 1994, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: John J. Bryan, Topeka, KS
Jeffrey A. Chanay, Topeka, KS
James R. Ward, Administrative Law Judge
George Gomez, Director